

SUPREME COURT, U.S.

73-1121

FILED

JAN 18 1974

SUPREME COURT OF THE UNITED STATES

PETITION FOR CERTIORARI

BY

NORTH GEORGIA FINISHING, INC., Petitioner

V.

DI-CHEM, INC., Appellee

THE FIRST NATIONAL BANK OF DALTON, Garnishee

from

SUPREME COURT OF THE STATE OF GEORGIA

IN ITS CASE NO. 28,211

Warren N. Coppedge, Jr.
Nathaniel Beresford
MITCHELL, MITCHELL, COPPEDGE & BERETT
101 NORTH THORNTON AVENUE
DALTON, GEORGIA 30720

ATTORNEYS FOR PETITIONER

TO THE SUPREME COURT OF THE UNITED STATES, WASHINGTON, D.C.

PETITION FOR CERTIORARI

This is a petition to the Supreme Court of the United States for a writ of certiorari to the Supreme Court of the State of Georgia to submit for review and reversal here the opinion and decision of the Supreme Court of the State of Georgia entered October 25, 1973, in its Case Number 28217, entitled NORTH GEORGIA FINISHING, INC., Appellant, V. DI-CHEM, INC., Appellee; FIRST NATIONAL BANK OF DALTON, Garnishee.

The opinion of the Georgia Supreme Court is officially reported in 231 Georgia Supreme Court Reports, Page 260, (1973). Writ of certiorari to the Georgia Court of Appeals was granted by the Georgia Supreme Court and is officially reported in 230 Georgia Supreme Court Reports, Page 623, (1973). The decision of the Court of Appeals of Georgia is officially reported in 127 Georgia Court of Appeals Reports, Page 593, (1972). This case was originally appealed from the Whitfield County Superior Court to the Supreme Court of Georgia which transferred without opinion to the Georgia Court of Appeals. These opinions and notice of denial of rehearing and notice of transfer appear herein as an appendix, in accordance with Rule 39.

The decision of the Supreme Court of the State of Georgia hereby appealed from was rendered October 25, 1973, denying Appellant-Petitioner's Motion for Rehearing of opinion entered October 4, 1973.

Jurisdiction of this Court to review this cause is

believed to exist in United States Code Title 28 Section 1257.

QUESTION PRESENTED (RULE 231(c)

Is Georgia Code Title 246 Section 101, insofar as it provides for the taking of property without prior notice and hearing through Process of Garnishment where suit shall be pending but before judgment, unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution?

STATE STATUTE INVOLVED (RULE 231(d))

Georgia Code Annotated Section 46-101.

"*Right to writ; wages exempt until after final judgment* — In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly, or monthly wages of any person residing in this State: Provided, further, that the wages of a share cropper shall also be exempt from garnishment until after final judgment shall have been had against said share cropper: Provided, further, that nothing in this section shall be construed as abridging the right of garnishment in attachment before judgment is obtained."

STATEMENT OF THE CASE (RULE 231(e))

On the August 20, 1971, DI-CHEM, INC., filed a complaint on an account against North Georgia Finishing, Inc. Also, on August 20, 1971, immediately after filing said suit, DI-CHEM, INC., filed with the Clerk of the Superior Court of Whitfield County, Georgia, an affidavit and bond for garnishment pursuant to Georgia Code Title 46, Sections 101 and 102 against The First National Bank of Dalton, as garnishee. The Clerk of the Whitfield Superior Court, immediately issued and had served upon the garnishee on August 20, 1971, the summons of garnishment. North Georgia Finishing, Inc., was not served with a copy of the process of garnishment and had no knowledge of same prior to service of summons on the garnishee. The affidavit and bond for garnishment was executed by an agent of the appellee pursuant to Georgia Code Title 46, Sections 101 and 102 on the basis of "a suit pending". North Georgia Finishing, Inc., had on deposit in The First National Bank of Dalton, at the time the summons of garnishment was served, a certain sum of money which constituted its payroll account. The effect of this garnishment action was to freeze whatever funds North Georgia Finishing, Inc. had on deposit in The First National Bank of Dalton at that time. On 23 August, 1971, North Georgia Finishing, Inc. posted a dissolutionment bond "to create standing" as required by law and the garnishee was discharged by order of the Superior Court of Whitfield County, Georgia. On September 15, 1971, North Georgia Finishing, Inc., filed with the Superior Court of Whitfield County a motion to dismiss the garnishment action. A hearing was held before the Whitfield County Superior Court on 29 November, 1971; and in an order of that Court dated 2 December, 1971, the motion to dismiss the writ of

garnishment was denied. The Superior Court issued at a later date a supplemental record on appeal in which it stated, "The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issue of notice and hearing, however, during argument of counsel certain cases were cited as authority by counsel for both parties and the Court's attention was specifically directed to the constitutional due process issue of notice and prior hearing as the same pertain to the facts of the instant case".

This action was appealed to the Supreme Court of Georgia which transferred the case to the Georgia Court of Appeals without opinion. The Court of Appeals of Georgia in a five to four decision ruled that the proceedings below had not, under Georgia procedure, raised the constitutional issue. However, a writ of certiorari to the Court of Appeals to reveiw that Court's judgment was granted by the Supreme Court of Georgia. In its opinion, the Supreme Court of Georgia discussed the issue of whether the constitutional question had been raised and ruled, "This Court now has before it the question of whether an attack on Code Annotated § 46-101 on the ground that it violates the due process and equal protection clauses of the State and Federal Constitutions is sufficiently raised by the pleadings and argument of counsel before the trial court as to be now considered by this Court. Although the pleadings generally raise the issue of due process and equal protection, the argument of counsel before the trial court that it was deprived of notice and hearing before its property was taken was not raised in the pleadings. No objection was made, however, on this ground and the trial judge specifically stated that he overruled the defendant's motion to dismiss the process of garnish-

ment on each and every ground therein. The Civil Practice Act of 1966 (Ga. L. 1966, p 609, Code Ann. §81A-108 (a)) has eliminated issue pleadings and has substituted notice pleadings. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (3) (123 SE2d 115); *Brown v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). Therefore, we find that the attack on Code Ann. §46-101 and the argument of counsel made without objection sufficiently presented the constitutional question to the trial court. The trial court specifically ruled on each and every ground thereof and this Court can now consider its ruling."

ARGUMENT FOR THE ALLOWANCE OF WRIT— RULE 231(h)

North Georgia Finishing, Inc. has been deprived of the use, benefit, and possession of funds in its bank account by State action in the garnishment of its account without prior notice or prior hearing.

The Supreme Court of the State of Georgia has determined that Georgia Code Title 46 Section 101 is not violative of the Fourteenth Amendment to the United States Constitution. This determination is not in accord with the holdings of the United States Supreme Court in *Snidach v. Family Finance Corp.*, 395 U.S 337, 89 S.Ct. 1820 (1969), and *Fuentes v. Shevin*, 92 S. Ct. 1983 (1972). The Supreme Court of Georgia in making such a determination has decided a federal question of substance not heretofore ruled upon directly by the United States Supreme Court but which opinion is in conflict with related decisions of the United States Supreme Court.

January 4, 1974

Mrs. Joline B. Williams, Clerk
The Supreme Court of Georgia
Judicial Building
Capitol Square South
Atlanta, Georgia 30303

ORDER OF RECORD AND
NOTICE OF CERTIORARI

RE: North Georgia Finishing, Inc., Appellant
V. Di-Chem, Inc., Appellee; First National
Bank of Dalton, Garnishee
Supreme Court of Georgia Case No. 28217

Dear Mrs. Williams:

Confirming our earlier conversations, please take this as *notice of appeal* to the United States Supreme Court, Washington, D. C., by North Georgia Finishing, Inc., from the order of the Georgia Supreme Court in the Court's decision of October 25, 1973, denying Appellant's Motion for Rehearing in Case No. 28217, as above, this appeal to be by certiorari under Rule 23 and others.

Pursuant to Rule 12 of the Supreme Court Rules, Title 28, United States Code §2071, et. seq., you are hereby respectfully requested to certify the entire record in this case and to provide for its transmission to the Supreme Court of the United States, Washington, D.C.

This appeal by certiorari is taken persuant to United States Code Title 28, Section 1257. Appellant North Georgia Finishing contends that Georgia Code Title 46, Section 101, insofar as it provides for the taking of

property without prior notice and hearing through process of garnishment where suit shall be pending but before judgment, is unconstitutional as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

Please prepare the aforesaid transcript of the record for transmission to the United States Supreme Court, and include the entire record.

Thank you.

Respectfully,

MITCHELL, MITCHELL,
COPPEDGE & BOYETT

/s/ Warren N. Coppedge, Jr.

Warren N. Coppedge, Jr.
Nathaniel Hansford

WNCjr/NH:kj

cc: H. E. Kinney, Esq.

cc: Carlton McCamy, Esq.

PROOF OF SERVICE

GEORGIA, WHITFIELD COUNTY.

I, WARREN N. COPPEDGE, JR., Attorney for Appellant, North Georgia Finishing, in Case No. 28,217 in the Supreme Court of the State of Georgia, against Di-Chem, Inc., appellee, and First National Bank of Dalton, garnishee, do hereby swear that on this the 4th day of January, 1974, I served a copy of the foregoing Notice of Appeal by Certiorari to the Supreme Court of the United States on Di-Chem, Inc., Appellee, and First National Bank of Dalton, garnishee, by mailing a copy of the foregoing notice and request for the record to their counsel of record, H. E. Kinney, Esq., Pittman, Kinney, Kemp, Pickell & Avrett of Dalton, Georgia, and Carlton McCamy, Esq., McCamy, Minor, Phillips & Tuggle of Dalton, Georgia.

/s/ Warren N. Coppedge, Jr.

WARREN N. COPPEDGE, JR.
APPELLANT'S ATTORNEY

Sworn to and subscribed before me,
this the 4th day of January, 1974:

/s/ Kaye C. Jordan

NOTARY PUBLIC, GA. STATE AT LARGE

APPENDIX A

CLERK'S OFFICE, SUPREME COURT OF GEORGIA

Atlanta, October 25, 1973

Dear Sir:

The motion for a rehearing was denied today: Case No. 28217, North Georgia Finishing, Inc. v. Di-Chem, Inc., et al.

Yours very truly,

Mrs. Joline B. Williams, Clerk

APPENDIX B

SUPREME COURT OF GEORGIA

28217. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC. et al.

Undercofler, Justice. Di-Chem, Inc., filed a complaint on an account against North Georgia Finishing, Inc. Immediately after filing said suit, Di-Chem, Inc., filed an affidavit and bond for garnishment against the First National Bank of Dalton, as garnishee.

North Georgia Finishing, Inc., filed a motion to dismiss the writ of garnishment on the ground that Code Ann. § 46-101 providing for garnishment in this state is unconstitutional because it violates the due process and equal protection clauses of the State and Federal Constitutions. After hearing argument on this issue, the trial court overruled the motion and signed a certificate for immediate review. The appeal is from this judgment. *Held:*

1. The defendant moved to dismiss the garnishment on the ground that it was issued under the authority of Georgia "Code Annotated § 46-101" and that it violated his rights of due process and equal protection guaranteed by the Constitutions of Georgia and the United States. The trial court certified: "The Court, at said hearing, considered the pleadings of record in said case and entertained argument of counsel. The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issues of notice and hearing, however, during argument of counsel certain cases were cited as authority by counsel for both parties and the court's attention was specifically directed to the

constitutional due process issues of notice and prior hearing as the same pertain to the facts of the instant case." Counsel for the plaintiff made no objection concerning the issues of hearing and notice as the same were raised in the argument of the defendant. After hearing argument of counsel, the court entered an order overruling the defendant's motion to dismiss the process of garnishment on each and every ground therein and certified the question for immediate review.

This court now has before it the question of whether an attack on Code Ann. § 46-101 on the ground that it violates the due process and equal protection clauses of the State and Federal Constitutions is sufficiently raised by the pleadings and argument of counsel before the trial court as to be now considered by this court. Although the pleadings generally raise the issue of due process and equal protection, the argument of counsel before the trial court that it was deprived of notice and hearing before its property was taken was not raised in the pleadings. No objection was made, however, on this ground and the trial judge specifically stated that he overruled the defendant's motion to dismiss the process of garnishment on each and every ground therein.

The Civil Practice Act of 1966 (Ga. L. 1966, p. 609; Code Ann. § 81A-108 (a)) has eliminated issue pleadings and has substituted notice pleadings. *Reynolds v. Reynolds*, 217 Ga. 234, 246 (123 SE2d 115); *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). Therefore, we find that the attack on Code Ann. § 46-101 and the argument of counsel made without objection sufficiently presented the constitutional question to the trial court. The trial court specifically ruled on each

and every ground thereof and this court can now consider its ruling.

2. Code Ann. § 46-101 provides: "In cases where suit shall be pending, or where judgment shall have been obtained, the plaintiff shall be entitled to the process of garnishment under the following regulations: Provided, however, no garnishment shall issue against the daily, weekly or monthly wages of any person residing in this State until after final judgment shall have been had against said defendant. . ." Code Ann. § 46-102 requires the complainant, his agent, or attorney at law to make affidavit before some officer authorized to issue an attachment, or the clerk of any court of record in which said garnishment is being filed or in which the main cause is filed, stating the amount claimed to be due in such action, or on such judgment, and that he has reason to apprehend the loss of the same or some part thereof unless process of garnishment shall issue and shall give bond, with good security, in a sum at least equal to double the amount sworn to be due, payable to the defendant in the suit or judgment, as the case may be, conditioned to pay said defendant all costs and damages that he may sustain in consequence of suing out said garnishment, in the event that the complainant shall fail to recover in the suit, or it shall appear that the amount sworn to be due on such judgment was not due; or that the property or money sought to be garnished was not subject to process of garnishment. Code Ann. § 46-105 provides for the summons of garnishment directed to the garnishee, the service, bond and subsequent proceedings. Ga. L. 1962, pp. 717, 718; 1964, pp. 220, 221.

After garnishment has been issued, the defendant may

dissolve the garnishment by filing a bond. Code § 46-401.

The appellant contends that the Georgia garnishment statute is unconstitutional because it does not provide the debtor with notice and an opportunity to be heard before his property is taken. It argues that Sniadach v. Family Finance Corp., 395 U.S. 337 (89 SC 1820, 23 LE2d 349) requires such a holding.

In Sniadach the Supreme Court of the United States (p. 340) held: "A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 U. S. 820 [49 SC 344, 73 LE 975], does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. *We deal here with wages—a specialized type of property* presenting distinct problems in our economic system. We turn then to the nature of *that* property and problems of procedural due process." (Emphasis supplied.)

"McKay was but a one sentence per curiam upon affirming the judgment of the Supreme Court of Maine, viz., McInnes v. McKay, 127 Me. 110 (141 A 699) (1928). The Maine court's opinion was a positive rejection of the view that attachment (which as the opinion indicates, could be equated with garnishment) constitutes an unconstitutional deprivation of property without due process of law. The Maine court recognized the obviously drastic character of attachment in the manner in which it interferes with the incidents of ownership prior to any judgment on the plaintiff's claim having been

made, but held that the deprivation of that 'property' was not 'the deprivation of property' contemplated by the Constitution. And if it be, it is not deprivation without 'due process of law' for it is a part of a process, which during its proceeding gives notice and opportunity for hearing and judgment. . . 141 A. at 702." American Olean Tile Co. v. Zimmerman, 317 FSupp. 150, 151 (USDC Hawaii 1970).

In Georgia the writ of garnishment is ancillary to the main action pending between the plaintiff and the defendant. *Dent v. Dent*, 118 Ga. 853 (1) (45 SE 680). "The plaintiff shall not have judgment against the garnishee until he shall have obtained judgment against the defendant." Code § 46-405. "The effect of the writ of garnishment is, therefore, to impound any asset or property of defendant which is found in the hands of the garnishee pending the resolution of the merits of the garnisher's claim. The writ itself constitutes, at most, a lis pendens notice that a right to perfect a lien on the garnisheed property exists, but such perfection must await judicial action." Kuffel v. United States, 103 Ariz. 321, 325 (441 P2d 771).

It follows that the Sniadach decision would indicate that the Supreme Court did nothing more than carve out an exception for wage earners from what the court deemed to be otherwise lawful prejudgment seizures, i. e., that garnishment of wages was a limited exception to the general rule of legality of garnishment statutes.

Blocker v. Blackburn, 228 Ga. 285 (185 SE2d 56) which held that Georgia's distress warrant proceed-

ings were unconstitutional and *Hall v. Stone*, 229 Ga. 96 (189 SE2d 403) which held that Georgia's bail trover statute was unconstitutional are not controlling here. In those cases, the property was seized without any notice to the owner.

This court is not alone in limiting the reach of the Sniadach decision to wages. See Roofing Wholesale Co. v. Palmer, 108 Ariz. 508 (502 P2d 1327); American Olean Tile Co v. Zimmerman, 317 FSupp. 150, supra; Black Watch Farms v. Dick, 323 FSupp. 100 (USDC Conn. 1971).

Other courts have come to an opposite rule. See Larson v. Fetherston, 44 Wis. 2d 712 (172 NW2d 20); Jones Press v. Motor Travel Services, 286 Minn. 205 (176 NW2d 87); Randone v. Appellate Dept. of Superior Court, 5 Cal. 3d 536 (488 P2d 13, 96 Cal. Reptr. 709).

Judgment affirmed. All the Justices concur, except Mobley, C. J., Grice, P. J., and Nichols, J., who concur specially because of the ruling in Division 1.

ARGUED SEPTEMBER 11, 1973 — DECIDED OCTOBER 4, 1973 — REHEARING DENIED OCTOBER 25, 1973.

Garnishment; constitutional question. Whitfield Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Samuel J. Brantley, for appellant.

H. E. Kinney, for appellees.

GRICE, Presiding Justice, concurring specially. I am

in full accord with everything stated in the opinion except Division 1, as to making a constitutional attack.

While the law of the case has been established as to the sufficiency of the attacks made here by virtue of *North Ga. Finishing v. Di-Chem*, 230 Ga. 623 (198 SE2d 284), I desire to take this opportunity to express some views that I have on the subject.

Requirements for attacking the constitutionality of a statute have been in force for many years in this state. The following statement of them should suffice.

"In order to raise a question as to the constitutionality of a 'law' . . . at least three things must always be shown: (1) the statute or part of a statute which the party would challenge must be stated, or pointed out with fair precision; (2) the provision of the Constitution which it is claimed has been violated must also be clearly designated; and (3) it must be shown wherein the statute violates such constitutional provision. [Cits.]" *Stegall v. Southwest Ga. Housing Authority*, 197 Ga. 571, 582 (30 SE2d 196).

There is indeed a solid reason for these requirements. It has been well put. "Since a statute is presumed to be valid and constitutional until the contrary appears, and can not be lawfully set aside by the courts unless the alleged conflict with the Constitution is plain and palpable, the burden is upon any party who assails it to present his attack in clear and definite terms, in order to call forth judicial action concerning it. In so grave or important a matter as declaring invalid an act of a co-ordinate department of government, the courts will not act upon vague and uncertain charges, and should decline to do so unless and until a clear

and specific contention or question is presented for determination. [Cits.]." *Abel v. State*, 190 Ga. 651, 654 (10 SE2d 198).

Accordingly, on many occasions this court has refused to consider attacks which do not measure up to these requirements.

As I view this record, the motion to dismiss the garnishment fails to set forth or point out with fair precision the *statute* which is challenged.

This court has consistently held that mere designation of "Georgia Code Annotated," or the like, without reference to the statute itself, is not sufficient. There has been no legislative enactment officially adopting such code as law. Therefore it does not have the legal effect of a statute.

In *Bowen v. State*, 215 Ga. 471 (111 SE2d 44) it was sought to attack the constitutionality of "subparagraph (a) of Code (Ann.) § 68-1626." However this court held as follows: "The attempt thus to attack the constitutionality of subparagraph (a) of Code (Ann.) § 68-1626 is futile, since there is no such paragraph and section in the official Code of 1933. Such subparagraph and such section have never become law in consequence of any necessary and required adopting or enacting legislative action. Hence, any decision rendered by this court at this time respecting the validity or the invalidity of subparagraph (a) of Code (Ann.) § 68-1626 would in no way affect the act from which these provisions were taken and placed in an unofficial annotated Code, which a publishing company in the City of Atlanta compiled for distribution and sale."

In *Widemon v. Burson*, 224 Ga. 665 (164 SE2d 128), each enumeration of error complained of failing to declare a section of the Annotated Code unconstitutional. This court held that "Any ruling upon the constitutionality of a section of the Annotated Code, which has never been adopted by the General Assembly, an essential necessary for it to become law, would in no wise affect the Act of the General Assembly from which the section of the Annotated Code was taken."

In *Turk v. State Hwy. Dept.*, 226 Ga. 245, 246 (174 SE2d 791), the attack was made upon "section 36-1307 Ga. Code Ann." This court held that this designation was not sufficient.

See also, *Morgan v. Todd*, 214 Ga. 497, 499 (106 SE2d 37); *Holmes v. State*, 224 Ga. 553, 558 (163 SE2d 803); *Cox v. Burson*, 226 Ga. 13 (2) (172 SE2d 406).

These unreversed unanimous decisions of this court are binding precedents which should have been adhered to in the disposition of this matter.

This court has spoken many times on the effect of unanimous unreversed decisions. In *Crown Laundry v. Burch*, 205 Ga. 211, 212 (53 SE2d 116), referring to three such decisions, Mr. Justice Candler speaking on behalf of the full-court declared: "Those cases are unquestionably authority for the ruling complained of; and the three cases from this court are all full-bench decisions which have not been overruled or materially modified, and since they are not in conflict with any of our older decisions, they are binding upon us and must be followed. There is no request to review and overrule those decisions in the manner prescribed by law (Code, § 6-1611), and so long as they are permitted to stand they have the *force*

and effect of a statute and are controlling on the question there decided." (Emphasis supplied.) See also *Hagan v. Asa G. Candler, Inc.*, 189 Ga. 250, 258 (5 SE2d 739, 126 ALR 108).

Reference to "Georgia Code Annotated" has been for mere convenience and aid in locating the law of this state and when it has been accompanied by citation to the statute enacted by the General Assembly there has been no problem. But here no such accompanying reference is made. The citation is only "Georgia Code Annotated § 46-101." With due regard for the high quality of the codal publication involved here, we must conclude that reference to it alone does not constitute a legal citation. We cannot take judicial notice of it.

These requirements for attacking a statute were not done away with by the Civil Practice Act (Ga. L. 1966, p. 609 as amended; Code Ann. § 81A-101 et seq.) or the Appellate Practice Act (Ga. L. 1965, p. 18, as amended; Code Ann. § 6-701 et seq.)

Rather, without exception, they have been reaffirmed in many cases of this court decided after the passage of these Acts, as is shown in the cases cited hereinbefore. Significantly, in none of such cases are those Acts ever mentioned.

There is no language in the Civil Practice Act which gives any support to the contention that it abrogated the requirements for challenging the constitutionality of a statute. None is forthcoming from Section 1 of that Act (Ga. L. 1966, pp. 609, 610; Code Ann. § 81A-101) to the effect that it governs procedure in all courts of record in all civil suits, with a noted exception, or from the provision which recites that the Act "shall be construed to secure

the just, speedy and inexpensive determination of every action." I approve of these objectives but the Act does not change the law involved here.

Furthermore, the concept of notice *pleading* derived from Section 8 of the Civil Practice Act and exemplified by such cases as *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89) and *Harper v. DeFreitas*, 117 Ga. App. 236, 238 (160 SE2d 260) is not applicable here. This is because a *motion* is not a pleading within the purview of the Civil Practice Act.

In this regard, Section 7 of that Act (Ga. L. 1966, pp. 609, 618; 1967, pp. 226, 230; Code Ann. § 81A-107) makes a clear distinction.

Subsection (a) of that section is headed "Pleadings," and enumerates specifically what pleadings are allowed, making no reference whatever to *motions*.

On the other hand, subsection (b) is headed "Motions and other papers," and in material part provides as follows: "(1) An application to the court for an order shall be made by motion which . . . shall state *with particularity* the grounds therefor . . . (2) The rules applicable to captions, signing, and all other matters of *form* of pleadings apply to all motions and other papers provided for by this Title:" (Emphasis supplied.)

This last provision, as to "matters of form," obviously does not relate to the content of the attacks made upon the constitutionality of a statute, as called for by the requirements set forth previously in this opinion.

It is significant that Section 7 (b) (1) requires that the grounds of motions be stated with *particularity*. Here

the motion to dismiss the garnishment did not do so.

Thus, as I apprise the situation, nothing in the Civil Practice Act abrogates the aforementioned requirements for attacking the validity of a statute.

Likewise, there is no provision in the Appellate Practice Act. (Ga. L. 1965, p. 18; Code Ann. § 6-701 et seq.) which does so. Section 23 (Ga. L. 1965, pp. 18, 40; Code Ann. § 6-905), which declares in substance that the Act is intended to provide a new appellate procedure, and should be liberally construed to bring about a decision on the merits to avoid dismissal of appeals except as specifically referred to therein, has my full support. However, it has nothing to do with the requirements of making a proper attack upon the constitutionality of a statute.

As I view it, there is no merit in the contention that the plaintiff's failure to object in the trial court to the content of the defendant's grounds for dismissal of the garnishment proceeding and the argument on certain cases resulted in a waiver of its right to challenge now the rules for attacking the validity of the garnishment statute. As stressed in this concurring opinion these are well established requirements for making such attacks. The burden is upon the party making the attacks to do so properly. It was not carried here.

I am authorized to state that Chief Justice Mobley and Justice Nichols join me in this special concurrence.

APPENDIX C

COURT OF APPEALS
of the State of Georgia

Atlanta, July 9, 1973

The Honorable Court of Appeals met pursuant to adjournment. The following order was passed:

NORTH GEORGIA FINISHING, INC. v.
DI-CHEM, INC. et al.

In accordance with the mandate of the Supreme Court, this case is transferred to the Supreme Court. See North Georgia Finishing Company, Inc. v. Di-Chem, Inc. et al, No. 27697, decided May 24, 1973.

COURT OF APPEALS OF THE STATE OF GEORGIA
Clerk's Office, Atlanta July 9, 1973

I certify that the above is a true extract from the minutes of the Court of Appeals of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX D

SUPREME COURT OF GEORGIA

27697. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC.

PER CURIAM. This case comes here by grant of a writ of certiorari to the Court of Appeals to review that court's judgment. 127 Ga. App. 593 (194 SE2d 508).

The original appeal was to this court, and this court erroneously transferred the case to the Court of Appeals.

We now conclude that a constitutional issue was sufficiently raised, that the judgment of the Court of Appeals was erroneous, and that judgment must be reversed.

Upon remand to the Court of Appeals, direction is given that the case be retransferred to this court for re-docketing here, so that the constitutional issues raised may be argued and decided on the merits.

Judgment reversed with direction. All the Justices concur except, Mobley, C. J., Grice, P. J., and Nichols J., who dissent from the judgment of reversal.

ARGUED MARCH 12, 1973 — DECIDED MAY 24, 1973.

Certiorari to the Court of Appeals of Georgia — 127 Ga. App. 593 (194 SE2d 508).

Mitchell, Mitchell, Coppedge & Boyett, Warren N. Coppedge, Jr., for appellant.

McCamy, Minor, Phillips & Tuggle, Pittman, Kinney, Kemp, Pickell & Avrett, for appellees.

APPENDIX E

47070. NORTH GEORGIA FINISHING, INC. v. DI-CHEM, INC. et al.

PANNELL, Judge, Di-Chem, Inc., brought an action against North Georgia Finishing, Inc., seeking a judgment in the amount of $51,279.17, and upon affidavit of plaintiff that said action was pending and that it "had reason to apprehend the loss of said sum, or some part thereof, unless process of garnishment issues," summons of garnishment issued and was served upon the bank in which defendant had its bank account. Three days later defendant gave bond to dissolve the garnishment, and subsequently made a motion to dismiss the garnishment, the only grounds of which, argued on this appeal, read as follows: "1. Said garnishment was issued under the authority of Georgia Code Annotated § 46-101, a code section which has been expressly held unconstitutional as violative of due process. 2. Said procedure is unconstitutional in that it is violative of the defendant's due process and equal protection rights guaranteed him by the Constitution of the United States and the Constitution of the State of Georgia." The motion was overruled, with proper certificate for review and an appeal was entered in this court. Contained in the record is the following certificate of the trial judge: "The court, at said hearing, considered the pleadings of record in said case and entertained argument of counsel. The pleadings of record raised generally the issue of constitutional due process, but did not specifically raise the due process issues of notice and hearing; however, during argument of counsel certain cases were cited as authority by counsel for both

parties and the court's attention was specifically directed to the constitutional due process issues of notice and prior hearing as the same pertain to the facts of the instant case. Among the cases cited were: (a) Sniadach v. Family Finance Corporation of Bay View, 395 U. S. 337 (1969); (b) Reeves v. Motor Contract Company, 324 FSupp. 1011 (1971); and (c) American Olean Tile Company v. Ralph E. Zimmerman, Jr., 317 FSupp. 150 (1970). Counsel for the plaintiff-appellee made no objection concerning the issues of hearing and notice as same are raised in the above mentioned cases on the grounds that said issues had not been raised by the defendant-appellant's motion to dismiss. After hearing argument of counsel, the court entered an order overruling the defendant-appellant's motion to dismiss the process of garnishment on each and every ground therein and within ten days thereafter the court certified the questions for appeal." *Held:*

The record on appeal is insufficient to identify the statute attacked as unconstitutional. The statute is identified only as a Section of Ga. Code Annotated, published by the Harrison Company. This is not sufficient. *Morgan v. Todd*, 214 Ga. 497, 499 (106 SE2d 37); *Bowen v. State*, 215 Ga. 471, 472 (111 SE2d 44); *Holmes v. State*, 224 Ga. 553, 557 (163 SE2d 803); *Widemon v. Burson*, 224 Ga. 665 (164 SE2d 128); *Turk v. State Highway Dept.*, 226 Ga. 245, 246 (174 SE2d 791). Nor does the record on appeal sufficiently identify the particular paragraph, section or article of the Federal or State Constitution of which the statute or procedure is claimed to be violative. *Webb v. Echols*, 211 Ga. 724 (88 SE2d 625); *Lanier v. Suttles*, 212 Ga. 154 (91 SE2d 21); *Pate v. Brock*, 212 Ga. 812 (96 SE2d 253); *Prince v. Thompson*, 215 Ga. 860, 861 (113 SE2d 772);

Ledford v. J. M. Muse Corp., 224 Ga. 617 (163 SE2d 815); *Herring v. R. L. Mathis Certified Dairy Co.*, 225 Ga. 653 (171 SE2d 124). See also *Walker v. Hall*, 226 Ga. 68, 69 (172 SE2d 411); *Tant v. State*, 226 Ga. 761 (177 SE2d 484); *Stroud v. Stroud*, 226 Ga. 769 (177 SE2d 574) and *Taylor v. Moultrie Tobacco Sales Board*, 227 Ga. 384, 385 (180 SE2d 737). We are bound by these decisions of the Supreme Court and only the Supreme Court can change these rulings. Further, the dissenting opinion is based upon alleged changes in the rules here applied made by the Civil Practice Act and the Appellate Practice Act. A goodly portion of the Supreme Court's decisions above cited were decided since passage of those Acts. We find nothing in the Civil Practice Act which changes the rules which we have set forth. This opinion, as such, does not deal with any "archaic form of pleading," but deals with the fact that the record, consisting partly of pleadings and partly of a motion, fails to disclose a proper constitutional attack upon any statute or that the trial judge passed upon any such constitutional attack if made.

The dissent relies on the application of rules applicable to "notice pleadings" and seeks to apply this to a motion to dismiss *which is not a pleading*. Motions are required to "state with particularity the grounds therefor. . . ." Section 7 (b) (1) of the Civil Practice Act *(Code Ann.* § 81A-107 (b) (1)). Paragraph (2) of this Section provides that rules applicable to captions, signing, and other matters of form of pleadings apply to all motions. This does not do away with the requirement stated in paragraph (1) as to particularity. Bigelow v. RKO Radio Pictures, 16 FRD 15, 17 (20 FR Serv. 13, 15). In that case it was said "Is the motion a pleading? The explicit language of Rule 7 (a) with reference to pleadings, and of Rule 7 (b) with reference to motions,

must cause this question to be answered in the negative. A motion is not a pleading. Moore's Federal Practice, Vol. 1, p. 1511 (2d Ed.). See also Johnson & Gould v. Joseph Schlitz Brewing Co., D. C. Tenn., 28 FSupp. 650." In United States v. 64.88 Acres of Land, 25 FRD 88, 90 (3 FR Serv. 2d 7(b).2), it was said: "On the subject of the requirements of Rule 7(b), in the Eastern District, an experienced trial judge in United States v. Krasnov, D. C., 143 FSupp. 184, 196 said 'I do not consider this rule to establish a mere technical requirement but rather hold it to be real and substantial.' In this connection it is interesting to note that Judge Igoe of Illinois in Bigelow v. RKO Radio Pictures, D. C., 16 FRD 15, in examining Rule 7 (a) which refers to pleadings and Rule 7 (b) which refers to motions, concludes that a motion is not a pleading. On this general proposition Barron & Holtzoff, Vol. 1, p. 405, in referring to the requirement of particularity says that the 'requirements are mandatory; compliance is essential to orderly procedure; . . .' "

Even should we assume that under a motion to dismiss for "failure to state a claim" (although there is no such motion here) constitutional questions could be raised by oral argument (see *Waters v. State*, 226 Ga. 278 (174 SE2d 420)) the *record on appeal* must show that such question *was properly raised* (as required by the cases cited) and also that such question was ruled upon by the trial judge. Neither appears here. Neither the motion nor the certificate of the trial judge shows (1) what statute was involved in the alleged constitutional attack or (2) what specific constitutional provisions, either Federal or State, were involved, nor did it show (3) that the trial judge ruled the alleged statute was or was not constitutional.

It might also be well to note that this case was transferred to this court by the Supreme Court, without opinion.

Accordingly, we must affirm the trial judge in overruling the motion to dismiss the garnishment.

Judgment affirmed. Eberhardt, P. J., Quillian, Evans and Clark, JJ., concur. Bell, C. J., Hall, P. J., Deen and Stolz, JJ., dissent.

SUBMITTED APRIL 7, 1972—DECIDED OCTOBER 26, 1972—REHEARING DENIED NOVEMBER 21, 1972—CERT. APPLIED FOR.

Garnishment. Whitfield Superior Court. Before Judge Vining.

Mitchell, Mitchell, Coppedge & Boyett, Samuel J. Brantley, for appellant.

Pittman, Kinney, Kemp, Pickell & Avrett, H. E. Kinney, for appellees.

HALL, Presiding Judge, dissenting. The majority opinion does not reach the merits of the appeal. It affirms the judgment upon the *ratio decidendi* of Supreme Court opinions that predate the CPA. It also cites Supreme Court decisions that postdate the CPA, but these are either memorandum decisions or summary opinions on the point which merely cite pre-CPA decisions for their authority. It appears that neither appellate court has ever squarely considered the question of the effect of the CPA on pleading a constitutional question. "The doctrine of stare decisis cannot be invoked to sustain, as authority, a decision which is in conflict . . . with

a previous statutory enactment to which the decision makes no reference, and which is made without reviewing or construing the statute, and in such a case the statute should be followed rather than the decision." 21 CJS 325-326, Courts, § 193. "Where previous decisions of this court are in conflict with a previous statutory enactment, to which no reference is made, such decisions will be rejected as authority, without the formality of reviewing and overruling them. 'It being a choice between the Act of the legislature and a subsequently conflicting decision of the court, the Act of the legislature speaks with imperative and controlling authority and must be followed in preference to the judicial utterance in conflict therewith.' *Central of Ga. R. Co. v. Jones,* 28 Ga. App. 258, 261 (110 SE 914)." *Murphy v. Harding,* 220 Ga. 634, 636 (140 SE2d 852). The *Jones* case by this court involved a similar issue—a statute liberalizing the procedural requirements for an assignment of error.

Prior to the CPA it was said: "Probably no phase of pleading in Georgia is fraught with more technicalities than with respect to raising constitutional issues." Georgia Procedure and Practice 38, § 2-23 (1957 Ed.). The question here is whether this archaic form of pleading is applicable under the CPA. In my opinion, it is not.

The Constitution of 1945 provides that "The General Assembly may provide for carrying cases or certain classes of cases to the Supreme Court and the Court of Appeals from the trial courts otherwise than by writ of error, and may prescribe conditions as to the right of a party litigant to have his case reviewed by the Supreme Court or Court of Appeals." *Code Ann.* § 2-3704.

It is common knowledge that our appellate judges differ in their view of the Appellate Practice Act of 1965

and the Civil Practice Act of 1966. These differences vary in degree and are based upon honest convictions. It must be acknowledged that these personal predilections have influenced the positions taken by the judges in cases before both appellate courts. Nevertheless, it should be emphasized that "the law on this question is not simply what the judges of this court think the law *should be,* but what the General Assembly has said it is." *Horton v. Brown,* 117 Ga. App. 47, 49 (159 SE2d 489). I respectfully submit that the intent of the General Assembly, as between deciding cases on the merits or avoiding the question by technicalities, is clear. "Analysis . . . shows that there is no gap between what they wrote and what in reason they must have meant." Woolford Realty Co. v. Rose, 286 U. S. 319, 330 (52 SC 568, 76 LE 1128).
568, 76 LE 1128).

The Appellate Practice Act of 1965, as amended, provides: "It is the intention of this law to provide a new procedure for taking cases to the Supreme Court and Court of Appeals, as authorized in the Constitution of 1945, Article VI, Section II, Paragraph IV (Georgia Code Anno., Section 2-3704), and, to that end, this law shall be liberally construed so as to bring about a decision on the merits of every case appealed, and to avoid dismissal of any case or refusal to consider any points raised therein, except as may be specifically referred to herein." *Code Ann.* § 6-905.

The CPA provides: "This Title governs the procedure in all courts of record of the State of Georgia in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in section 81A-181. The provisions of this Title shall be construed to secure the just, speedy, and inexpensive determination of every action." *Code Ann.* § 81A-101.

Since the enactment of the CPA, both this court and the Supreme Court have held that we now operate under "notice pleading" and that "a petition should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Byrd v. Ford Motor Co.*, 118 Ga. App. 333 (163 SE2d 327); *Hunter v A-1 Bonding Service*, 118 Ga. App. 498 (2) (164 SE2d 246); *Harper v. DeFreitas*, 117 Ga. App. 236 (1) (160 SE2d 260); *Bourn v. Herring*, 225 Ga. 67 (3) (166 SE2d 89). All that a motion to dismiss must formally state is that the petition "fails to state a claim." The same principle was applied in *Benefield v. Malone*, 110 Ga. App. 607 (139 SE2d 500) with respect to a motion for summary judgment (overruling *Suggs v. Brotherhood of Locomotive Firemen &c,. 104 Ga. App.* 219, 223 (121 SE2d 661)).

As stated above, the CPA governs "all courts of record" and "all suits of civil nature." It is therefore axiomatic that it covers the manner of pleading this constitutional issue.

The old rules of pleading used two technicalities to avoid constitutional questions: a statute could not be identified by citing a section of Ga. Code Annotated, published by the Harrison Company; and the pleader had to specifically identify the particular paragraph, section or article of the Federal or State Constitution of which the statute or procedure is claimed to be violative. These technicalities are not only in direct conflict with the CPA and the Appellate Practice Act but are also anomalous. By what logic can an appellate court use the Ga. Code Annotated for formal citation in its printed opinions which are permanent, official State records and at the same time deny its use to a party litigant in typewritten

papers under a system of "notice" pleading. As for identifying constitutional provisions, a similar strict and word-perfect requirement was once necessary in objecting to the charge of the court. However, in a recent case interpreting the Appellate Practice Act, this court said that "the statute does not demand a formalistic, technically perfect objection. The only requirement is that the grounds of the objection be stated distinctly enough for a 'reasonable' trial judge to understand its nature, enabling him to rule intelligently on the specific point. In other words, it is merely a rule of common sense." *Horton v. Ammons*, 125 Ga. App. 69, 72 (186 SE2d 469), affirmed *Smith v. Ammons*, 228 Ga. 855 (188 SE2d 866). The same reasoning applies to pleading a constitutional issue. The question is whether the pleadings give fair notice to the opposite party and enable a "reasonable" trial or appellate judge to understand the issue presented? In my opinion, the appellant's motion to dismiss meets this test. It points out that the cited Code section *(Code Ann.* § 46-101) has been held unconstitutional as violative of due process and that the procedure used violates the due process and equal protection rights guaranteed by the Constitution of the United States and the Constitution of the State of Georgia. The trial judge recited in his order that the argument before him was specifically directed to the constitutional due process issues of notice and prior hearing as they apply to the facts in this case. He cited what he considered to be the applicable precedents and ruled on the merits of the case. An important constitutional issue is now before this court. We do not have the right to avoid deciding it on the merits by invoking a technical rule of pleading which has been superseded.

I am authorized to state that Chief Judge Bell and Judges Deen and Stolz concur in this dissent.

APPENDIX F

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta
February 1, 1972
Number 6827

Dear Sir:

The record in the case of
North Georgia Finishing, Inc.

VS.

Di-Chem, Inc., et al

has this day been received and filed in this office, and transferred to the Court of Appeals.

Yours very truly,

Mrs. Joline B. Williams, Clerk